DOCUMENT RESUME

ED 262 681 HE 018 738

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TITLE Tensions Produced by Introduction of Clinical Training in Legal Education.
PUB DATE 4 Apr 85
NOTE 12p.; Paper presented to the Annual Meeting of the American Educational Research Association (69th, Chicago, IL, March 31-April 4, 1985).
PUB TYPE Viewpoints (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Accreditation (Institutions); Accrediting Agencies; *Clinical Experience; *College Faculty; Employment Practices; Experiential Learning; Faculty Evaluation; Higher Education; *Law Schools; Lawyers; *Legal Education; *Personnel Policy; *Standards
IDENTIFIERS *American Bar Association

ABSTRACT

The addition of a clinical component to formal legal education is discussed, along with a proposal to upgrade the status of clinical faculty. Attention is directed to the history of efforts by the practicing bar to influence the scope and methods of legal education, the controversy over a proposed equality-of-treatment standard, and the future of clinical education in law. Clinical training programs proliferated in the 1970s, and most law schools now offer students the opportunity to apply their theoretical learning to clients' legal problems. This "hands on" experience is closely supervised by seasoned practitioners. In the mid-1980s, law lost its popularity as a career choice and increasing numbers of clinical teachers were denied tenure for failing to publish sufficient scholarly research. The practicing bar became alarmed that significant disparity in the treatment of clinical teachers might result in an inferior status for skills-training programs. Acting through the American Bar Association, the accrediting agency for law schools, the practicing bar sought in 1984 to adopt a new accreditation standard (405e) that would compel law schools to treat clinical teachers in a manner reasonably similar to tenure-track faculty in regard to job security and prerequisites. (Author/SW)

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Tensions Produced by Introduction of Clinical Training in Legal Education

Abstract

The core of legal education has changed very little since 1870 when Dean Langdell introduced his "revolutionary" case method of instruction at Harvard. The most significant pedagogical innovation in the past century was the proliferation of clinical training programs in the 1970's. Most of the nation's law schools now offer students the opportunity to apply their theoretical learning to the legal problems of real clients. This "hands on" experience is closely supervised by seasoned practitioners who have been recruited by law schools to perform this specialized skills-training instruction. Adding a clinical component to formal legal education was strongly supported by the organized bar, which has long urged law schools to enrich the curriculum with more "practical" courses. During the law school enrollment boom of the late 1970's clinical programs expanded along with other educational elements and, although some traditional law teachers expressed skepticism about the enterprise, the clinical movement carved its own niche in legal education. In the mid 1980's, however, as law lost its popularity as a career choice and increasing numbers of clinical teachers were denied tenure for failing to publish sufficient scholarly research, it became increasingly evident that all was not well in the world of clinical legal education. Traditional law teachers have long struggled to balance their instructional role as the intellectual trainers of future practitioners with their duties as scholars to advance the state of learning in the discipline. For clinicians saddled with an intensive style of instruction that is inherently voracious in its consumption of time and energy, meeting university tenure and promotion standards in regard to scholarship proved nearly impossible. Recognizing this difficulty, many law schools employed their clinical teachers under contractual arrangements that did not involve conventional tenure. As this practice gained in popularity, the practicing bar became alarmed that significant disparity in the treatment of clinical teachers might doom the skills-training programs that they supervised to an inferior status in the law schools and ultimately undermine their credibility with students. Acting through the ABA, which is the sole accrediting agency for law schools, in 1984 the practicing bar sought to adopt a new accreditation standard (405e) that would compell law schools to treat clinical teachers in a manner reasonably similar to tenure-track faculty in regard to job security and perquisites. Adoption of this standard was strenuously resisted by the nation's law schools on a number of grounds and it was ultimately watered down to a statement of good practice. This paper traces the history of efforts by the practicing bar to influence the scope and methods of legal education, describes in detail the background of the controversy over the proposed equality-of-treatment standard and offers some comments about the future of clinical education in law.

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TENSIONS PRODUCED BY INTRODUCTION OF CLINICAL TRAINING
IN LEGAL EDUCATION

Remarks for Aera Symposium, April 4, 1985
Dean N. William Hines

The summer of 1984 was a period of great agitation in the world of legal education. A proposal changing official standards used by the American Bar Association (ABA) to accredit law schools once again caused law's professional educators to cross rhetorical swords with law's professional practitioners over what both disputants regarded as a fundamental issue of professional policy.

The specific language of the controversial requirement was as follows.

> 405(e) The law school shall afford to full-time faculty members whose primary responsibilities are in its professional skills program a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time faculty members. . . .

A dramatic showdown on the floor of the annual meeting of the ABA's House of Delegates between the nation's most powerful lawyers and most willful law teachers was averted at the eleventh hour by a compromise that changed the mandatory "shall" in the standard to an exhortatory "should". In its water-down form, the proposed standard was then easily passed by the ABA's legislative body. It is a perhaps a tribute to the lawyers' faith in the power of words to alter the course of human events that this insubstantial substitution of a less forceful verb should totally defuse a heated controversy, at least temporarily.

To outside observers it may be difficult to understand why this seemingly innocuous proposal was regarded as such an anathema by the law school world in the first place. What is so controversial about affording equality in treatment to all full-time law teachers? To anyone familiar with the century-long competition between practicing lawyers and academic lawyers for control over legal education, however, the importance of this latest skirmish is obvious.

While the particular proposal (405(e)) was new, the three underlying issues it raised were as old as the process of professional education itself: 1) To what degree, if any, should a substantial apprenticeship experience be a required element of professional preparation? 2) If there must be an emphasis in the formal education to which professional students are exposed, should it be on the scholarly aspirations of the law or on more practical training, and 3) who should decide these questions, legal educators or practitioners?

As a preliminary observation it should be understood the notion that lawyers should receive formal education at all is of quite recent origin in the legal profession. While notable exceptions may be cited, throughout history lawyers as a group have not been distinguished by their achievements in or commitment to formal education. Indeed, until the late 19th century, no one seriously suggested that a solid formal education was important to a career at the bar. One became a lawyer simply by learning law as clerk to a successful practitioner, who had in turn been trained as an apprentice. When a leading social scientist of the time first advised the leaders of the bar in 1876 that if law was to justify its position as a learned profession, it would have to tighten its admission requirements by requiring some period of formal training evaluated by a serious competency examination, the proposal was regarded as radical in the extreme. Nevertheless this agenda very soon became a rallying cry for those who felt the impacts of Jeffersonian democracy had robbed the American bar of much of the dignity and credibility enjoyed by their English counterparts.

Since its founding in 1878, the ABA has waged a continuous crusade to upgrade the status of the legal profession. From the beginning, increased formal education has been a key plank in the ABA's campaign to improve the competency of those admitted to the bar. Not surprisingly, the ABA's drive

to raise professional standards was eagerly supported by the fledgling group of modern law teachers emerging in the late 19th century, who saw special merit in requiring law school attendance by all who aspired to practice law. (The modern University law school is generally dated from 1870 when Christopher Columbus Langdell introduced the case method of legal instruction at Harvard.) When the ABA's enthusiasm for mandatory formal law schooling waned temporarily, the Association of American Law Schools (AALS) was formed in 1907 to champion the cause directly. It is noteworthy that in spite of the best efforts of both groups, it was not until the 1930's that any state limited admission to the bar to law school graduates, and not until the 1950's that formal training in law school superceded apprenticeship as the conventional path to a law career. The ABA began its accreditation activities in 1921.

While consistently promoting formal legal education, the ABA has long taken the view that not every enterprise that calls itself a law school qualifies to provide the necessary training. For years the ABA fought to disqualify part-time programs, but it finally settled for recognition of two educational tracks, a 3-year full-time track and a four-year part-time track. Over time the ABA's efforts were successful not only in requiring formal legal education, but in elevating it from an undergraduate to a graduate level of academic work. It is only in the last generation that a college degree was made a prerequisite to law school admission. Understanding the significance of the ABA's emergence, first as the professional arbiter of bar admission eligibility, and more recently as the promulgator of standards for evaluating law schools, is critical to appreciating what was at stake in last summer's fight with the AALS over the proposal to upgrade the status of clinical teachers.

Not only does the ABA Council address educational matters on behalf of the practicing bar, it speaks authoritatively on them through its accreditation standards. State court and bar admission authorities throughout the nation have accepted the ABA accreditation processes as the controlling mechanism for determining whether graduates from a particular law school satisfy the local legal education requirement -- a law degree qualifies one for bar admission purposes only if it is obtained from an ABA accredited school. Failure to get or retain ABA accreditation is an institutional death sentence for a law school in most states.

While the ABA and AALS have worked closely together to control the rites of passage into the profession, their marriage has always been a troubled one. Recurring rifts have occurred over such basic issues as the mission of law schools, their structure and what they should teach. Ever since the case method became firmly established as the predominant pedagogy for teaching the cluster of intellectual skills thought to be fundamental to legal competence (Karl Llewellan once defined "thinking like a lawyer" to include the ability to interpret, analyze and synthesize legal materials, and the skill to use them to diagnose and solve legal problems), practicing lawyers and professors have quarreled over what else law students should learn and what law professors should do. Traditionally, practicing lawyers pressured law schools to concentrate on substantive doctrine (rules of law) and the intricacies of legal procedures (process). More recently bar leaders have added to their agenda increased emphasis on training in practical lawyering skills. Clinical education and the wealth of related skills-training programs that most law schools have introduced during the past 15 years represent an accommodation reached with the profession in the 1970's on the recurrent demand for a more practical preparation for law practice.

Professors, on the other hand, tend to favor a firmer integration of law schools into the academic community, with a greater curriculum emphasis on the philosophical underpinnings of law and the relevance of the theory and methods of other disciplines to the understanding and improvement of law and legal institutions. Consistent with this preference, professors of law have long aspired to gain full recognition as serious scholars by their university peers. Early legal scholarship was a direct outgrowth of the law professor's near-religious faith in the case method, involving painstaking efforts to identify and trace the doctrinal threads in the ever expanding cases and statutes that formed the raw material for legal research. Later law scholars expanded their interest to include the structures and processes of legal decision-making. Conventional legal research had the salutory feature of blurring the distinction between the professor's professional and scholarly roles. It won the general approval of the practicing bar, who found it useful in their work, while eliciting a reaction of bemused and restrained respect within the academic community.

Since the appearance of the legal realists in the 1920's, however, increasing numbers of law professors have aspired to a more intellectual approach to scholarship, seeking to expose the historical and cultural roots of legal doctrine, to study the consequences of legal rules and processes, and to explore the interrelationship of law to moral norms and socio economic phenomena. Some of this research is excellent and has clearly established the law professoriate as capable of serious scholarship in the eyes of the larger academic community, but it has also served to dramatize the divergence between the professors' roles as specialized trainers of students for law practice and as broad-gauge scholars. Observers have frequently commented on the schizophrenic character of law teaching. To use Professor Tom Bergin's vivid description, law professors

are expected to play simultaneously the incompatible roles of both Hessian-trainer and intellectual scholar. Whichever aspect of the professor's dual role the practicing bar might wish to enhance, there is no doubt the rewards systems of most universities are powerfully loaded to encourage scholarship and that most professors choose a career in academic law because they prefer reflective scholarship to active law practice.

Against this background, now consider the implications of the ABA Council's proposal to require law schools to accord clinical teachers equivalent status with the regular faculty in terms of job security and perquisites. In the first place, the proposal represents a dramatic instance of practicing professionals attempting to dictate to teaching professionals how the educational enterprise should be run. This putative "overregulation" by the ABA was the latest in a recent series of controversial intrusions into the turf of the academics, and this factor probably accounts for much of the passion with which it was resisted.

Three years ago the ABA laid the foundation for the current controversy by amending the accreditation standards to require law schools to "offer instruction in professional skills." This general requirement was adopted only after AALS leaders had vigorously objected to a more detailed proposal that specified in detail the professional skills for which instruction was to be required, but the die was cast for further regulation to promote practical training.

It should be understood that law professors are not opposed to the proposition that law schools can and should do a better job in equipping their graduates with the basic professional skills needed in the modern practice. To the contrary, the skills training movement, if it can be called that, has enjoyed the support of many of the leading lights within the traditional law professoriate. The problem centers on the not-so-

subtle difference between initiating a reform because it is sound educationally and structuring it in a way that best serves the particular need of a school in contrast to being told by an outside group that you must not only provide a specific program of instruction, but you must do it in a certain approved manner.

And that brings us to the present proposal to upgrade the status of professional skills teachers. Currently in many law schools clinicians and other skills-training specialists are not on the regular tenure track, but are employed in a variety of different arrangements ranging from separate tenure tracks. to long-term contracts to renewable year to year contracts. The main reason clinicians and other skills-training specialists are treated differently is that they are not expected to produce scholarship as an integral part of their job performance. While a few clinicians do prepare and publish traditional scholarship, and most of them regularly produce high quality pleadings, briefs and memoranda, the one-on-one style of intensive instruction involved in skills training and the obligation to follow clients' cases through to their conclusion generally does not produce a work-place climate that is conducive to the production of the type of comprehensive, probing, and reflective research that characterizes the best of modern legal scholarship. This is not to say that these teachers might not thrive as scholars in a different professional environment, it is only that they do not produce scholarship in their present setting, nor did most of them come to work at law schools for that purpose. Nevertheless, it is the expectation of little or no participation in the scholarly life of the academic community that accounts for the reluctance of law schools to treat clinical teachers in precisely the same manner as traditional law teachers, for whom scholarly writing is prescribed as an essential element of their work.

In view of the ABA Council this difference in treatment results in skill-training personnel being relegated to a second-class citizenship in the law school world, thereby damaging the academic credibility of the programs for which they carry the major responsibility. This disparagement, according to the ABA, is the evil to be exorcised through adoption of the proposed new standard mandating equality in the treatment of full-time teachers.

The AALS and its adherents do not deny or belittle the existence of the problem, but they strongly challenge whether it requires the draconian imposition of a uniform solution of the type proposed by the ABA Council. The AALS argues that skills-training is still a very recent addition to the program of legal education, and that most schools are now experimenting to determine the right mix of traditional and clinical offerings. It is further asserted that the law schools are at least as troubled as the ABA by the potential harmful effects of bifurcating law faculties into scholars and clinicians, and that many schools have undergone soul-searching reassessments of their goals and priorities as a result. A few of the schools have revised their tenure standards to reflect the different performance expectations regarding clinical teachers: some have introduced innovative employment arrangements offering features similar to tenure, others have turned to university-wide job systems already utilized by career scientists and health care professionals, and many others are still testing different models to determine what works best for their particular situation. While it is not stated expressly, implicit in the AALS position is the notion that it is not patently wrong for an academic situation to favor teachers who engage in scholarship over teachers who do not. The key point the AALS presses, however, is that the ABA intervention is premature;

it prescribes a crude monolithic cure before the results are in from the nationwide laboratory, where sincere efforts are underway to find more discrete remedies for the complicated malady.

It is not difficult to project the immediate future with regard to the 405(e) issue. The ABA standard may say only that law schools "should" treat their clinical faculty roughly the same as their tenure-track folks, but it is clear from the fallout after the adoption of the compromise language that those in charge of the ABA accreditation process intend to press law schools for rapid assimulation of clinicians into the mainstream of the faculty. A few schools will resist vocally, and a few may abandon their clinical programs entirely rather than compromise a deeply valued principle. For the great majority, however, compliance will come easily because they are already well down the chosen road. For schools with sufficient resources, there is no need to choose between theoretical and practical education, they can do both at a high level of quality.

If the resource picture changes significantly, as there are ominous signs (e.g. declining enrollments) that it might, a quite different scenario is likely to develop. The strong commitment of traditional law faculties to case method instruction and to intellectual scholarship could create a major challenge to the less prestigious, more resource intensive, skills instruction programs. If the time ever arrives when law school faculties must actually make a choice between a basically theoretical style of legal education and a highly practical one, there is no doubt in my mind that most clinical programs will be jettisoned in the name of maintaining academic quality. As one of my colleagues is fond of saying, there is nothing more practical to a lawyer than a sound theory. If clinical training is forsaken by the law schools, there will be a confrontation with

the organized bar unlike anything seen in the past century. I hope this never comes to pass, but if one could remain safely on the sidelines, it would be fun to watch the fireworks.